Supreme Court, U.S.
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MAY 26 1999
CLERK

(3)

No. 98-1742

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

RON EDWARDS, WARDEN,

PETITIONER,

-vs-

MICHAEL HERRINGTON,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Michael Herrington, through undersigned counsel, respectfully requests leave to file his Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

Respondent was represented by appointed counsel on direct appeal in the State courts. Respondent's appeal to the Supreme Court of Ohio and Federal Habeas Corpus proceedings proceeded *in forma pauperis*.

15 pp

Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

DAVID H. BODIKER #0016590
Ohio Public Defender

DAVID HANSON #0059580
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Counsel of Record

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COUNSEL FOR RESPONDENT

NO. 98-1742

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October Term, 1998

RON EDWARDS, Warden

Petitioner,

v.

MICHAEL HERRINGTON,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

STATE OF OHIO)
SS:
COUNTY OF ROSS)

I, Michael Herrington, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my inability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1980 $800.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends or other sources? $20 state pay from a correctional facility

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing). No

a. If the answer is yes, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Michael Herrington
MICHAEL HERRINGTON

Subscribed and sworn to before me this 13 day of May 1999.

Dawn M. Hale
NOTARY PUBLIC

DAWN M. HALE
Notary Public, State of Ohio
My Commission Expires April 29th, 2000

#84985

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT HERRINGTON'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I.

WHETHER THIS COURT SHOULD DISTURB THE FEDERAL CIRCUIT COURT'S FACT-SPECIFIC DETERMINATION UNDER BRECHT v. ABRAHAMSON, 507 U.S. 619, (1993) THAT RESPONDENT WAS PREJUDICED BY THE TRIAL COURT'S INSISTENCE THAT THE JURY RETURN CONSISTENT VERDICTS.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE COURT BELOW FINDING PREJUDICIAL ERROR IS SUPPORTED BY ESTABLISHED LAW AND THE RECORD OF THE CASE.

A. This case does not present a question of great importance or scope worthy of certiorari review.

It is important to view the decision below in the proper context. Harmless error analysis requires a fact-specific inquiry unique to each case. Under Brecht v. Abrahamson, 507 U.S. 619 (1993) and O'Neal v. McAninch, 115 S. Ct. 992 (1995), error is not harmless when it has either a substantial or injurious effect in determining the jury's verdict. In Brecht, this Court adopted the harmless error test set forth in Kotteakos v. United States, 328 U.S. 750 (1946). Kotteakos recognized that assessments of harmless error are necessarily context-specific, leading this Court to remark that such judgments may be "tempered," but may not be "governed" by stare decisis or "what has been done in similar situations." Kotteakos, at 762.

The Kotteakos / Brecht standard is well settled. The Sixth Circuit has had years of experience with it. The Sixth Circuit applied that standard after making a thorough examination of the particular facts and circumstances in Respondent Herrington's case. Its conclusion that the trial judge's instruction constituted prejudicial error is well-founded in law and supported by the record. This case presents no reason to disturb the Sixth Circuit's judgment.

Moreover, even if Petitioner's argument were correct (and it is not, as explained below), Petitioner does not, and cannot, claim this case presents a novel constitutional

question. Rather, Petitioner only asserts the decision in this particular unreported case is wrong. No new law would be made by this case.

B. The panel's determination of prejudice is well supported by the record in Respondent's case.

All parties agree there was error in this case. Petitioner attacks the Sixth Circuit's determination the error was not harmless by asserting that the Sixth Circuit applied a "presumption of prejudice" instead of the Kotteakos / Brecht standard. (Petition for Writ of Certiorari, pages 8-10; hereafter "Petition, page _"). Petitioner argues that the Sixth Circuit "did not focus on the impact of the supplemental instruction in the context of the entire record." (Petition, page 13). Finally, Petitioner attempts to analogize this case with Roy v. Gomez, 81 F3d 863 (1996). (Petition, page 14). Because the Sixth Circuit conducted a thorough, complete and correct harmless error analysis as mandated by this Court, Petitioner's arguments fail.

Under Brecht v. Abrahamson, 507 U.S. 619 (1993), error is not harmless when it has either a substantial or injurious effect in determining the jury's verdict. The Sixth Circuit showed, in detail, exactly how the faulty instruction impacted Respondent's jury. (Petitioner's Appendix, pages 8-10). It is inaccurate for Petitioner to say that the Sixth Circuit did not follow Brecht. The "substantial or injurious effect" in this case is obvious: insisting on consistent verdicts obligated the jury to find Respondent guilty of a purposeful killing merely if he committed the robbery. Petitioner is misleading on this point:

> "The following assumptions must be made in order to warrant a conclusion that the supplemental instruction had a substantial and injurious effect on the jury's verdict. First, it must be assumed that the jury intended to find Herrington

> not guilty of aggravated murder; and second, that the jury felt compelled to find him guilty of aggravated murder in any event, due to the supplemental instruction."

(Petition, pages 12-13).

This argument ignores Ohio's requirement that a conviction of aggravated felony murder consists of a felony (here, aggravated robbery) and a purposeful killing. Unlike Petitioner and the District Court, the Sixth Circuit understood this requirement. The Sixth Circuit correctly noted that the jury in Respondent's case was required to find all the elements of aggravated robbery in order to find aggravated murder. Therefore, if the jury did not believe Respondent was guilty of aggravated robbery, it could not find all the elements to convict on aggravated murder. "Thus," the court noted, "it would be at least as reasonable to conclude that the jury's question indicated that it had found guilt only on the aggravated robbery count." (Petitioner's Appendix , page 9).

Therefore, the "assumptions" Petitioner accuses the Sixth Circuit of indulging in do not exist. Rather, the Sixth Circuit understood that Ohio's felony murder statute differs from most states', and applied the instructions to the harmless error test accordingly. The instruction requiring consistent verdicts was neither legally nor logically mandated. To convict on the aggravated murder charge, the jury was required to find an element in addition to the aggravated robbery – purposely causing the death of another. Thus, proof beyond a reasonable doubt that Respondent was present during a killing that occurred during a robbery would be insufficient to sustain a guilty verdict for aggravated murder.

Ignored by Petitioner is the Sixth Circuit's analysis of how the error impacted the jury. As the Sixth Circuit noted, a conclusion that the jury had made all the requisite

findings to convict on both charges could not follow from a conclusion that the jury's question indicated it was ready to convict on one charge. If the jury found all of the elements of aggravated murder, it would have been required to find all of the elements of the lesser included aggravated robbery (because an element of aggravated murder is aggravated robbery). If the jury found all the elements of aggravated robbery, however, consistency would not require that it find aggravated murder. (Petitioner's Appendix, page 12).

As Justice Scalia concluded in Sullivan v. Louisiana, 508 U.S. 275 (1996), 276-83, the Sixth Amendment's guarantee of a jury trial allocates to actual jurors the exclusive responsibility to render criminal verdicts, and those same jurors must be the focus of harmless error analysis. If those jurors deliberated to a verdict under the influence of a constitutional error, then their verdict is tainted. The Sixth Circuit did as Brecht and Sullivan require, and rendered an individualized determination based on the circumstances in this particular case. Therefore, Petitioner's argument that the Sixth Circuit treated the error as a "structural" defect is not sound.

Finally, Petitioner attempts to analogize this case to this Court's decision in California v. Roy, 519 U.S. 2 (1996). Roy is inapplicable to this case. In Roy, this Court reversed the Ninth Circuit's formulation of a new harmless error test that the Ninth Circuit drew from a concurring opinion in Carella v. California, 491 U.S. 263 (1989). Carella dealt only with legal presumptions. Respondent's case does not involve legal presumptions, and unlike the Ninth Circuit, the Sixth Circuit applied the Brecht standard to the entire record in this case. It did not, like the Ninth Circuit, supplant this Court's caselaw with its own. Petitioner wrongly states the Sixth Circuit reversed Respondent's

case because it was "*unable* to determine 'what was in the minds of the jurors.'" (Petition, page 14, emphasis in original). In reality, the Sixth Circuit reversed because the error had "a substantial and injurious effect on the jury's interpretation on the initial, correct instructions." (Petitioner's Appendix, page 15).

The Sixth Circuit followed this Court's directives when it found the error in Respondent's case not harmless.

CONCLUSION

This case does not present a novel constitutional question for this Court. Moreover, the Sixth Circuit followed the authority from this Court and reached the correct result. For both of these reasons, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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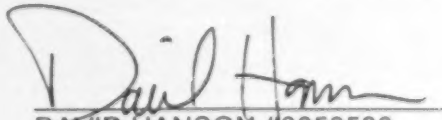
CERTIFICATE OF SERVICE

I, DAVID HANSON, a member of the Bar of this Court, hereby certify that on this 26th day of May, 1999, a copy of the foregoing RESPONDENT HERRINGTON'S BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, and AFFIDAVIT OF INDIGENCY was deposited in a United States Mail Box, first class postage prepaid, pursuant to Rule 29.3, to Stuart A. Cole, Assistant Attorney General and Charles L. Wille, Assistant Attorney General, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215. I further certify that all parties requiring to be served have been served.



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